BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NATHAN W. RICHARDSON Claimant VS. **FIDELITY MANAGEMENT CORP.** Respondent AND **HARTFORD ACCIDENT & INDEMNITY** Insurance Carrier	)	Docket No. 1,059,298

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the July 5, 2012, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes. Joseph Seiwert, of Wichita, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant sustained injury by repetitive trauma while working for respondent. The ALJ found claimant had a date of accident of January 16, 2012, and that timely notice of injury by repetitive trauma was provided to respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the March 8, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of the ALJ's finding that claimant sustained injury by repetitive trauma while working for respondent and that the repetitive trauma was the prevailing factor in his injuries. Although in its Application for Review respondent raised issues concerning date of accident, timely notice and whether the ALJ erred in ordering

respondent to provide medical treatment and temporary total disability compensation to claimant, those issues were not addressed in its brief to the Board.

Claimant argues the ALJ correctly concluded that he sustained injury by repetitive trauma while working for respondent and that the repetitive nature of his work was the prevailing factor in his work injuries.

The issues for the Board's review are: Did claimant sustain injury by repetitive trauma while working for respondent? If so, was the repetitive trauma the prevailing factor in claimant's injuries?

FINDINGS OF FACT

Claimant, who was 26 years old at the time of the preliminary hearing, has worked for respondent, a management corporation, since August 16, 2010. He worked in maintenance and had done remodeling, installed HVAC equipment and changed out compressors for air conditioners. He worked at two apartment complexes, and the buildings each have three floors. He said he goes up and down stairs all day.

Claimant testified he began to notice a burning sensation in the inside of his left knee. The sensation came and went, but he noticed a major problem after the air conditioning season in 2011. He said there "wasn't an actual event" but said he had been servicing the air conditioning units, which were on the roofs, and he had been carrying air conditioner parts up and down the stairs.[1] He estimated he had been lifting weights of 75 to 100 pounds. He was also working longer hours than usual during that time.

Claimant testified that on November 29, 2011, he saw Dr. Kenas for a physical and for his knee pain. He testified that the day before he saw Dr. Kenas, he spoke to his supervisor, James "Jim" Roth, and told him he thought he had sustained a work-related injury to his left knee.

Claimant testified that on January 2, 2012, his knee flared up. He had been painting that day, and at the end of the day his left knee was swollen. He told Mr. Roth he was having problems with his knee and did not know how much longer he could go up and down the stairs carrying the weight he had been carrying. A couple hours after that conversation, claimant left work early and went to the emergency room. There he was told to elevate his knee and ice it every two hours. Claimant said he went to work the next day and told Mr. Roth that he would need help. Claimant was provided help and allowed to stop and rest and ice his knee at work. Claimant said no one from respondent told him he needed to see a workers compensation doctor.

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[1] P.H. Trans. at 10.

Claimant followed up with his family physician, Dr. Diana Ketterman, on January 10, 2012. He told Dr. Ketterman that he climbed a lot of stairs at work. He also told her he had a family history of gout and rheumatoid arthritis. Dr. Ketterman ordered an MRI, which was done on January 12. It showed there was a possibility of an undersurface tear of the posterior medial meniscus. Claimant said Dr. Ketterman gave him some restrictions, which included continuing to ice his knee. She also added a weight restriction. Claimant followed those restrictions at work, but he was still going up and down stairs, which bothered his left knee.

Dr. Ketterman referred claimant to Dr. Phillip Hagan, an orthopedic surgeon, who claimant first saw on January 16, 2012. Claimant said he told Dr. Hagan that he had been having problems with his left knee for six months to a year. Dr. Hagan's record of January 16, 2012, indicates claimant gave a history that the knee had been bothering him about a year but the pain had been persistent the last three months. Claimant acknowledged he told Dr. Hagan that his injury was not related to an accident and that no attorneys were involved. Claimant did tell Dr. Hagan that he performed somewhat heavy labor at work.

Dr. Hagan recommended claimant have surgery to repair a torn meniscus. Dr. Hagan performed surgery on claimant's torn meniscus on January 20, 2012. Claimant said he had continued to work until a day or two before his surgery. Claimant was sent to physical therapy after the surgery. Dr. Hagan had not released claimant to return to work by the date of the preliminary hearing.

On or about January 17, 2012, Mr. Roth sent claimant to see Stephanie in human resources. Claimant testified he told Stephanie he had been having problems with his left knee and wanted to file a workers compensation claim. He acknowledged that was the first time he told anyone at respondent he related his left knee condition to his work and wanted to file a workers compensation claim. Claimant testified that Stephanie said it was too late to file a workers compensation claim because the accident had occurred more than 48 hours before it was reported. She suggested he file for short-term disability. Claimant said he sat down with Mr. Roth, who started to fill out some paperwork, but then they got into an argument. Claimant said he believed Mr. Roth was not facing the facts. Mr. Roth knew he had been having problems with his knee, and Mr. Roth had seen him limping. He had told Mr. Roth about the knee and his need to ice it. He also had informed Mr. Roth when he took off work to see the doctor.

On cross-examination, claimant was asked by respondent's attorney whether he had gone hunting over the New Year's Eve weekend. Claimant initially said he had gone deer hunting on Saturday, December 31, 2011. However, later he said he must have gotten the date wrong and denied going deer hunting the day before he went to the emergency room. He said he had taken off work for two days during the bow season, and thinks that might have been the weekend of Christmas 2011. Claimant said he did not hunt from a blind but instead sat at the edge of a field on the ground. He parked near the spot where he hunted and did not have to walk much. He also went hunting on the weekend of January 7.

Claimant denied injuring his left knee on a hunting trip and said his knee was injured before he ever went hunting. He said his knee had been injured over time due to his work for respondent.

Claimant admitted that he had complained to Mr. Roth that he was having a problem with arthritis in his left knee but that was before he knew what his problem was. He said no one had made a diagnosis until he had an MRI but the doctor had told him it could be arthritis.

Jim Roth testified that he works for respondent as a service director. He is claimant's supervisor. He and claimant would at times work side-by-side and he was able to observe claimant performing his work duties. Mr. Roth said claimant on occasion would say that his knee was hurting him and that it was arthritis, but that it was no big deal. Prior to January 2012, claimant had never related his knee problems to an accident or injury at work, nor had claimant said he wanted to pursue it as a workers compensation claim.

Mr. Roth said on January 2, 2012, claimant came to him and the apartment complex manager, Julie Lutz, and told them he did not know how long he could do his job because his knee was hurting him. Mr. Roth and Ms. Lutz thought it was due to a hunting trip because claimant had taken off the Friday before the weekend and on Monday, January 2, 2012, had been bragging about getting a couple of deer. When claimant complained to Mr. Roth about his knee on January 2, 2012, he did not relate it to his work. Mr. Roth said a few hours after his conversation with claimant, claimant left work and went to the emergency room.

Mr. Roth testified that on January 16, 2012, after claimant had seen Dr. Hagan, claimant told him he was scheduled for surgery on his left knee. Mr. Roth testified claimant said, "Technically, this could be a work comp claim."[2] Mr. Roth said claimant said he was not going to make a workers compensation claim but that he could have because the injury occurred when he was working at the Conquistador apartment complex. Mr. Roth said the next day, January 17, claimant told him that he and his wife had "pinned it down to when he actually had hurt his knee, and it was knee kicking the carpet," which Mr. Roth said had occurred when claimant was working at Conquistador.[3] Mr. Roth then left to get the paperwork for a workers compensation claim, and claimant got up and left the room. Mr. Roth testified that later, when he and claimant were filling out the paperwork, claimant said, "I don't know why you are filling that out. This isn't a work comp claim. I'm only going to do work comp if I'm not going to get paid for this week that I'm off."[4]

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[2] P.H. Trans. at 54.

[3] P.H. Trans. at 55.

[4] P.H. Trans. at 56.

Mr. Roth testified he was present with claimant on January 17, 2012, when claimant spoke with Stephanie in human resources by telephone. Mr. Roth said claimant told Stephanie he wanted to learn more about short-term disability and also that he did not want to do workers compensation. Claimant said he did not want to go a week without pay. At some point during the telephone conversation, claimant turned to Mr. Roth and said that Stephanie told him he could not file under workers compensation because he had not reported the accident within 48 hours and that short-term disability did not kick in until the sixth day of absence.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) defines "burden of proof" as:

> . . . the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508 states in part:

> (e) ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) ''Personal injury'' and ''injury'' mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(3) (A) The words ''arising out of and in the course of employment'' as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . . .

(g) ''Prevailing'' as it relates to the term ''factor'' means the primary factor, in relation to any other factor. In determining what constitutes the ''prevailing factor'' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

"A workers compensation claimant's testimony alone is sufficient evidence of his or her own physical condition."[5] "Medical evidence is not essential or necessary to establish

[5] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶ 1, 61 P.3d 81 (2002).

the existence, nature, and extent of a worker's injury. Here, [claimant's] testimony was sufficient to support an award."[6]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[8]

ANALYSIS

Only claimant and his supervisor, James Roth, testified at the March 8, 2012, preliminary hearing. Claimant testified that his job with respondent required that he frequently walk up and down several flights of stairs, carry parts weighing up to 75 to 100 pounds. Presumably he would frequently squat and kneel down while servicing air conditioning units. His left knee symptoms started during the summer of 2011, what claimant described as "the air conditioning season." Claimant sought medical treatment in the fall of 2011. Claimant believes he told his supervisor, Jim Roth, about his knee injury at that time, but on January 2, 2012, after claimant had been painting all day, he told Mr. Roth that he was having problems with his knee and that he did not know how much longer he could continue to carry the heavy weights up and down stairs. Claimant left work early that day to go to the emergency room. Mr. Roth admits that claimant complained about his knee but never said it was due to an accident at work and never said he wanted to file a workers compensation claim. The day claimant went to the emergency room, Mr. Roth said claimant had talked about having gone deer hunting, and Mr. Roth believed claimant's knee problems were related to that hunting trip. Eventually, on January 20, 2012, claimant had surgery.

Before his surgery, claimant said he had attempted to file a workers compensation claim with respondent but was told he was too late. Mr. Roth testified that on January 16, 2012, claimant mentioned wanting to file a workers compensation claim but then changed his mind. On January 23, 2012, claimant filed an Application for Hearing which alleged "on

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[6] *Graff v. Trans World Airlines,* 267 Kan.854, 864, 983 P.2d 258 (1999); see *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 3, 547 P.2d 751 (1976).

[7] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[8] K.S.A. 2011 Supp. 44-555c(k).

or about 1/16/12" he injured his "right [*sic*] knee and all parts affected thereby" from "repetitive overuse while performing normal job duties."[9]

The ALJ had the opportunity to view the in-person testimony of claimant and of Mr. Roth. She found claimant's testimony to be credible. "The Court is persuaded by Claimant's testimony and the medical documentation and finds that the repetitive nature of his work is the prevailing factor in his work injuries."[10]

The record does not contain an expert medical opinion on causation. No physician testified that claimant's injury was due to his work activities or that those job duties constituted a repetitive trauma that resulted in injury to his knee. Likewise, no physician testified that repetitive traumas at work were the prevailing factor in causing claimant's injury. No physician gave a contrary opinion either. As such, the credibility of claimant's testimony is important. The Board generally gives some deference to an ALJ's determination of credibility where the ALJ had the opportunity to view the testimony in person. And claimant's testimony concerning causation is supported by the histories contained in the medical records. Claimant was 26 years old at the time of his injury. Claimant denies having had any knee problems before going to work for respondent. Although there is some mention of arthritis, there is no testimony or medical evidence that claimant's torn medial meniscus, for which he underwent surgery, is the result of arthritis or is an aggravation of a preexisting condition.

Based on the record presented to date and giving some deference to the ALJ's determination that claimant was a credible witness and accepting his testimony as true, this Board Member finds that claimant has satisfied his burden of proving his knee injury was the result of repetitive traumas at work and that the work activities were the prevailing factor in his injury. Furthermore, based upon an injury date of January 16, 2012, notice of injury was timely given.

CONCLUSION

Claimant sustained injury by repetitive trauma while working for respondent and the repetitive trauma was the prevailing factor in causing claimant's injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 5, 2012, is affirmed.

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[9] Form K-WC E-1, Application for Hearing filed January 23, 2012.

[10] ALJ Order (July 5, 2012) at 1.

IT IS SO ORDERED.

Dated this _____ day of September, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Nelsonna Potts Barnes, Administrative Law Judge